IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

RAMONA HINOJOSA, individually as a wrongful death beneficiary and as the heir to the estate of ALBERT HINOJOSA,	§	
***Plaintiffs*,**	§	
	§	
v.	§	**CIVIL ACTION NO. 2:13-cv-319**
	§	
BRAD LIVINGSTON, *et al.*,	§	
***Defendants*,**	§	***JURY DEMANDED***

DEFENDANT BRAD LIVINGSTON'S AMENDED MOTION TO DISMISS ON THE BASIS OF QUALIFIED IMMUNITY

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BRAD LIVINGSTON, RICK THALER AND WILLIAM STEPHENS' MOTION TO DISMISS ON THE BASIS OF QUALIFIED IMMUNITY

TO THE HONORABLE DISTRICT COURT JUDGE GREG COSTA:

NOW COME Brad Livingston, William Stephens, and Rick Thaler, herein referenced as Defendants, and file this Motion to Dismiss on the basis of qualified immunity pursuant to Fed. R. Civ. Proc. 12(b)(6).

I. ALLEGATIONS AGAINST LIVINGSTON, STEPHENS AND THALER IN THE COMPLAINT

Everything is bigger in Texas including its prison population. *California's Prison Population Eclipsed By Texas*[1] ("California now has fewer than 136,000 state inmates, eclipsed by about 154,000 in Texas.").[2] Plaintiffs sue the top three security/correctional officials of the largest prison system in the United States-TDCJ Director Brad Livingston, TDCJ Correctional Institution Division (CID) Director William Stephens and retired TDCJ Correctional Institution (CID) Division Director Rick Thaler under 42 U.S.C. 1983 for the 2011 death of Albert Hinojosa while he was incarcerated

[1] http://www.huffingtonpost.com/2012/06/13/california-prison-popualation_n_1594926.html

[2] TDCJ had 111 units and an inmate population of 152,303 as of August 31, 2012. TDCJ Statistical Report, p. 1 http://www.tdcj.state.tx.us/documents/Statistical_Report_FY2012.pdf; TDCJ http://www.tdcj.state.tx.us/unit_directory/index.html

at the TDCJ Garza West Unit. They claim that each defendant had a clearly established legal duty to monitor Albert Hinojosa's medical condition, supervision, housing and medical treatment while he was incarcerated at the TDCJ Garza West Unit, ensure that he is provided an air conditioned environment, whether or not medical professionals assigned to make these determinations made such recommendations, and generally second guess and micro manage by policy, the specific responses of the Unit medical and correctional officials assigned the responsibility of responding to the inmates on a day to day basis as part of their job duties.[3]

The Complaint, paragraph 16, begins its "FACTS" by misquoting the National Weather Service, misspelling "lightning" and citing a statistic that is irrelevant and false:

> 16. According to the National Weather Service, ***"heat is the number one weather-related killer in the United States***, resulting in hundreds of fatalities each year." On average, heat kills more people than "floods, lightening,(sic) tornadoes and hurricanes combined." One of those victims, Albert Hinojosa, died at TDCJ's brutally hot Garza West Unit. (*emphasis added*)

The National Weather Service's actual statement on its web page is:

> ***Heat is one of the leading weather-related killer in the United States***, resulting in hundreds of fatalities each year.[4] (*emphasis added*)

The web page of the National Oceanic and Atmospheric Administration, a federal agency that includes the National Weather Service, places heat as the number one cause of weather related death.[5] The Centers for Disease Control reported that 8015 deaths were heat related and 13,970

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3 TDCJ Garza East Unit has a maximum inmate capacity is 2,278 and it is managed by 323 security employees, 87 non-security staff, 7 Windham Education employees and 52 contract medical staff: http://www.tdcj.state.tx.us/unit_directory../nh.html http://www.tdcj.state.tx.us/unit_directory../ni.html

4 http://www.nws.noaa.gov/os/heat/index.shtml

5 http://www.noaawatch.gov/themes/heat.php

deaths were cold weather related during a 21-year period in the United States. American Meteorological Society July 2005[6], article entitled "Heat Mortality Versus Cold Mortality: A Study of Conflicting Databases in the United States."

The New American, December 23, 2008[7], in an article entitled "Heat or Cold: Which Is More Deadly?" reports that:

> "...statistical evidence shows that cold weather is twice as deadly as hot weather...From 1979 to 1997, extreme cold killed roughly twice as many Americans as heat waves, according to Indur Goklany of the U.S. Department of the Interior," Singer and Avery write. "Cold spells, in other words, are twice as dangerous to our health as hot weather."

While allegations made in a Complaint are generally deemed to be true, publicly available data that may be judicially noticed is inconsistent with Plaintiffs' claim that "heat is the number one weather-related killer in the United States,".[8] While heat death's rank as a killer is not relevant to

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6 http://journals.ametsoc.org/doi/pdf/10.1175/BAMS-86-7-9377

7 http://www.thenewamerican.com/tech/environment/item/6665

8 RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS:

(a) SCOPE. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) KINDS OF FACTS THAT MAY BE JUDICIALLY NOTICED. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

c) TAKING NOTICE. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) TIMING. The court may take judicial notice at any stage of the proceeding any issue in this case, it appears that the number of cold related deaths is about twice the heat related deaths in the United States.

The TDCJ Garza West Unit where Albert Hinojosa, died is located in Beeville, Texas. It has been accredited by the American Correctional Association since August 2007. Its maximum inmate capacity is 2,278 and it is managed by 323 security employees, 87 non-security staff, 7 Windham Education employees and 52 contract medical staff.[9]

What follows is a demonstration of the insufficiency of the Complaint's allegations against Livingston, Thaler and Stephens to overcome their qualified immunity arising from their positions as the top three administrators of the Texas Department of Criminal Justice, Correctional Institutions Division at the time of Hinojosa's death on August 29, 2012.

> 26 ...Defendants Thaler, Stephens, and Livingston knew of the ten deaths from heat stroke in 2011, and of Mr. Adams' death from heat stroke just a few weeks before Mr. Hinojosa died. Yet they did nothing to ensure prisoners like Hinojosa received accommodations, a timely intake physical, or implemented procedures to protect him from the deadly heat.
>
> 37. Moreover, Defendants TDCJ, Livingston, Thaler, Stephens, Kennedy and Guterrez have chosen not to take such action even though they know many prisoners have medical conditions that make the extreme heat deadly.
>
> 52. TDCJ and UTMB officials, including Livingston, Thaler, Stephens, Kennedy, Guterrez and Murray know prisoners in TDCJ custody suffer from these disabilities, and are at increased risk of heat-related injury and death.
>
> 55. ...when prisoners arrive from temperature-controlled jails to the brutally hot Garza West Unit, the Defendants know they are at heightened risk of heat-related injury or death.

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[9] http://www.tdcj.state.tx.us/unit_directory../nh.html
http://www.tdcj.state.tx.us/unit_directory../ni.html

67. ...TDCJ officials, such as Kennedy, Thaler, Stephens, Guterrez, Murray and Livingston, know that TDCJ and UTMB fail to immediately identify prisoners with heat-sensitive medical conditions and know that this failure endangers prisoners, yet they have done nothing to correct it.

94. Livingston, Thaler, Stephens, Kennedy, Guterrez, and Murray knew extreme temperatures can be deadly. But they, as well as UTMB, also knew TDCJ routinely housed people with hypertension and depression in extremely hot facilities like the Garza West Unit. TDCJ's policies and practices, which Livingston, Thaler, Stephens, Kennedy, Guterrez, and Murray implemented (and could have changed), make no accommodation for people with hypertension or depression during periods of extreme temperatures.

95. Though Livingston, Thaler, and Stephens work in Austin and Huntsville, as long-time Texans they are very familiar with the high-temperatures the state experiences during the summer months.

106. In 2011, over a year before Hinojosa died, State Representative Sylvester Turner, the former chair of the Texas Criminal Justice Subcommittee, wrote a letter to Livingston expressing his concern about the high temperatures in TDCJ prisons, that"temperatures inside cells have reached as high as 120 degrees during the day and do not fall below 100 degrees at night." He asked TDCJ to take "any and all preventative measures … to ensure that inmates and guards inside TDCJ do not suffer."

108. Livingston was also sued in *McCollum v. Livingston*, a wrongful death case that was filed a few weeks before Hinojosa's death. Mr. McCollum died after suffering a heat stroke at TDCJ's Hutchins Unit – another transfer facility.

112. TDCJ's Emergency Action Center generates reports that track heat-related injuries and deaths system-wide. High-ranking officials like Thaler, Stephens, Kennedy, and Guterrez, routinely review the EAC reports generated at the facilities they supervise.These reports would have shown them prisoners and staff were suffering heat-related injuries every summer at the prison.

131. TDCJ and UTMB officials, including Livingston, Thaler, Stephens, Kennedy and Guterrez, know that many prisoners with hypertension, diabetes, schizophrenia, and depression, such as Hinojosa, live in Texas prisons.

Paragraphs 26, 37, 52, 55, 67, 94, 95, 106, 108, 112, 131 claim that defendants knew other inmates had died from heat, that Texas summers are hot and that some prisoners are at an increased risk of heat injury. They do not claim that defendants were aware of any medical needs of Hinojosa, any knowledge of his circumstances, that they had medical training or that they had duties at the Garza West Unit that included housing, classifying or treating inmates based on their medical circumstances. Knowledge alone is an insufficient basis for Constitutional liability. *Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S. Ct. 1937, 1949-50 (2009):

> ...respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of "supervisory liability" is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a Bivens action—where masters do not answer for the torts of their servants—the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

Qualified immunity is not defeated by the claim Defendants "...did nothing to ensure prisoners like Hinojosa received accommodations, a timely intake physical, or implemented procedures to protect him from the deadly heat." (Paragraph 26). Plaintiffs do not allege that these Defendants knew anything about any special needs or medical condition of Hinojosa, or that they were aware of any special "accomodations" that might be needed specific to his medical needs. *Blackmon v. Kukua, et al*, 758 F.Supp.2d 398 (S.D.Tex.,2010) ("The summary judgment evidence does not show, however, that Defendant Brad Livingston, Executive Director of the TDCJ, knew about Blackmon's complaints, let alone that he took any action with respect to them... Defendants Latorre, M. Garza, and Livingston are entitled to qualified immunity to the extent that they could be found liable under the Eighth Amendment at all.") (pp.17-18, 23 Opinion attached as **Exhibit 1**).

The claim that TDCJ Security Administrators violated the Eighth Amendment by not ensuring that Hinojosa receive "a timely intake physical" or did not identify his medical condition (paragraphs 52, 67) does not violate clearly established law. *Lee v. Young*, 533 F.3d 505, 511 (7th Cir.2008) ("[I]n determining the best way to handle an inmate's medical needs, prison officials who are not medical professionals are entitled to rely on the opinions of medical professionals."). *Hayes v. Snyder*, 546 F.3d 516, 527 (7th Cir.2008) (reiterating "the presumption that non-medical officials are entitled to defer to the professional judgment of the facility's medical officials on questions of prisoners' medical care"). *Fantone v. Herbik*, 2013 WL 2564429 (3rd Cir.2013) (State prison administrators who handled inmate's grievances were not deliberately indifferent to his serious medical needs, in violation of Eighth Amendment, where administrators had no responsibility or authority to treat inmates medically, and had no reason to believe that prison doctors were either mistreating or not treating inmate.); *Lee v. Rushing*, 2013 WL 2462247 (5th Cir. 2013) (Sheriff was not liable under § 1983 for deliberate indifference to prisoner's serious medical need based on prisoner's claim that sheriff was aware of prisoner's scalp condition and failed to ensure timely care, in alleged violation of Eighth Amendment; prisoner failed to allege any personal involvement by sheriff in his treatment, medical complaints were monitored by the jail's medical personnel, and there was no evidence indicating that sheriff personally ignored prisoner's medical complaints or denied prisoner treatment.); *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3d Cir.1993). Warden and Commissioner for Corrections, neither of whom were physicians, could not be considered deliberately indifferent to prisoner's medical needs simply because they failed to respond directly to medical complaints of prisoner)

27. Even though ten men died of heat stroke in 2011, the Defendants made no changes to their operation of the Garza West Unit. In fact, high-level TDCJ officials did not consider these deaths a problem. In fact, in the face of these deaths, one official, who was responsible for overseeing prisons where eight previous deaths occurred, testified TDCJ was doing a "wonderful job" and "[didn't] have a problem with heat-related deaths." Thus, Defendants took no action to protect future prisoners, like Hinojosa, in the face of TDCJ's obviously inadequate procedures.

43. The Executive Defendants also chose not to provide prisoners at the Garza West Unit, including Hinojosa, opportunities to cool off in an air-conditioned environment. Though some parts of the Garza West Unit are air conditioned and available to use as a respite area, such as the visitation rooms, prisoners were not given a chance to cool off.

55. ...when prisoners arrive from temperature-controlled jails to the brutally hot Garza West Unit, the Defendants know they are at heightened risk of heat-related injury or death.

59. Moreover, Defendants do not even permit personal fans at the Garza West Unit.

60. And not only are prisoners deprived of cups at the Garza West Unit, Defendants provide grossly inadequate amounts of water to help prisoners survive the extremely-high temperatures indoors. TDCJ policy requires officers only to bring one large jug per fifty-four prisoners to the prisoner living areas (at most) three times a day. Throughout the system, and at Garza West, in particular, the jugs did not contain enough water for each prisoner to drink enough to protect them from the heat, and are frequently filled with lukewarm water.

110. As the conditions at the Garza West Unit are long-standing, well documented, and expressly noted by prison officials in the past, Defendants knew subjecting prisoners, like Hinojosa, to the obvious risk of prolonged exposure to high ambient temperatures and humidity, posed, and continue to pose, a life-threatening health risk.

> 111. Yet, rather than seek to have the housing areas cooled by air conditioning, a cooling alternative, or to make accommodations for inmates with heat-sensitive disabilities, like Hinojosa, to cool down, or to make sure inmates with serious medical conditions such as diabetes or hypertension were housed in air conditioned units, these officials chose to subject all inmates to dangerous, extreme heat.
>
> 114. Despite the epidemic of heat-related deaths, the Defendants have refused to act, authorize or otherwise approve actions to address these conditions.
>
> 118. As Defendants well know, hypertension itself also increases a patient's susceptibility to heat stress, and, combined with heat, can cause impaired motor and cognitive function, reduced blood flow, and a breakdown of the blood/brain barrier. Heart disease diminishes the body's ability to regulate internal temperature.
>
> 144. The individual Defendants failure to stop these dangerous practices (all of which they actually knew of at the time of Hinojosa's death at the Garza West Unit) endangered Hinojosa and violated his rights under the Eighth and/or Fourteenth Amendments to the United States Constitution, proximately causing his death.

There are eight defendants in this case. None of the individual defendants are vicariously liable for any of the acts or omissions of any other defendant. Claims made collectively against defendants are insufficient to defeat the qualified immunity of any individual defendant but must allege what each public official did or failed to do that was Constitutionally required. *Marcilis v. Twp. of Redford*, 693 F.3d 589, 596, 605 (6th Cir.2012). *Atuahene v. City of Hartford*, 10 Fed. Appx. 33 (2nd Cir.2001). (Simply " 'lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct' " fails " 'to satisfy [the] minimum standard' that 'a complaint give each defendant fair notice of what the plaintiffs claim is and the ground upon which it rests".). *Jolly v. Klein*, 923 F.Supp. 931, 943 (S.D. Tex. 1996); *Murphy v. Kellar*, 950 F.2d 290, 292 (5th Cir. 1992). The conduct of one defendant may not be attributed to another defendant absent allegations of specific personal involvement as to each defendant. Dudley v. Angel, 209 F.3d 460, 462 (5th Cir. 2000).

> 28. Livingston, Thaler and Stephens, were similarly unconcerned. The deaths of prisoners from heat stroke were regularly discussed at meetings Thaler and Stephens held with their deputies, including Kennedy. Even though the existing policies were obviously inadequate, and did nothing to cool the housing areas, Thaler, Stephens, and Kennedy continued to follow the same deadly course of conduct. Air conditioning or otherwise cooling the Garza West Unit or other prisons was never even discussed. Nor was moving individuals with heat-sensitive medical conditions or disabilities to air-conditioned prisons discussed or implemented.
>
> 30. Nor did Executive Director Livingston take steps to cool the non air conditioned prisons – even though prisoners continued to die from extreme temperatures over several years. In fact, even today Livingston has taken no action to upgrade TDCJ's facilities to protect inmates from these deadly conditions.
>
> 35. Though extreme indoor temperatures at the Garza West Unit in the summer are well known to TDCJ and UTMB officials, TDCJ's leadership, including Kennedy, Stephens, Thaler, and Livingston, has taken no steps to air condition prisoner housing areas at the Garza West Unit.
>
> 93. And Livingston, Thaler, Stephens, Kennedy, Guterrez, and Murray all knew inmate living areas at the Garza West Unit were not air conditioned and that the apparent temperatures routinely skyrocketed during the hot Texas summers and routinely exceeded 90 degrees indoors.
>
> 100. High-level TDCJ officials have also been sued before about these conditions.In the seminal Texas prison reform case, the *Ruiz* class action, the Southern District observed prisoners were dying of heat-related causes as far back as 1999. *Ruiz v. Johnson,* 37 F.Supp.2d 855, 904 (S.D. Tex. 1999).

The allegations in paragraphs 28, 30, 35, 93, 100 claiming absence of air conditioning sets forth no violation of clearly established law-courts have not held that there is a Constitutional right to an air conditioned prison. *Blackmon v. Garza,* 484 Fed. Appx. 866 (5th Cir. 2012), footnote 6:

> "FN6. We also note that, like the *Gates* court, we do not suggest that air conditioning is mandatory to meet the requirements of the Eighth Amendment." *Blackmon v. Garza,* 484 Fed. Appx. 866 (5th Cir.2012) referencing *Gates v. Cook,* 376 F.3d 323 (5th Cir.2004)

Despite litigation on prison conditions in a class action suit that resulted in a federal court virtually in control of the Texas Prison System for 27 years, Judge William Wayne Justice, in an 89-page opinion, did not order that Texas prisons be equipped with air conditioning. *Ruiz v. Johnson,* 37 F.Supp.2d 855 (S.D.Tex.,1999) reversed *Ruiz v. Johnson*, 178 F.3d 385 (5th Cir.1999). Neither has any other Court within the Fifth Circuit. *Blackmon v. Kukua, et al*, 758 F.Supp.2d 398 (S.D.Tex.,2010). Cases compiled from all federal circuits *in Rights of Prisoners § 3:56 Temperature and ventilation,* Michael B. Mushlin (4th ed. October 2012) do not disclose one case finding a constitutional right of a prisoner to air conditioning.

> 38. There are some parts of the Garza West Unit where prisoners could live, at least until they receive the critical intake physical to identify which prisoners suffer from heat-sensitive medical conditions. But TDCJ and UTMB officials, including Livingston, Thaler, Stephens, Kennedy, Guterrez, and Murray, do not take any steps to house prisoners with heat-sensitive conditions in those areas.

> 94. Livingston, Thaler, Stephens, Kennedy, Guterrez, and Murray knew extreme temperatures can be deadly. But they, as well as UTMB, also knew TDCJ routinely housed people with hypertension and depression in extremely hot facilities like the Garza West Unit. TDCJ's policies and practices, which Livingston, Thaler, Stephens, Kennedy, Guterrez, and Murray implemented (and could have changed), make no accommodation for people with hypertension or depression during periods of extreme temperatures.

Not only is it clearly established that Livingston, Thaler and Stephens, as security administrators may rely on the judgments of medical professionals in treating and medically assigned inmates, Plaintiffs admit that such decisions are within the province of TDCJ and UTMB medical staff-not security officials:

> 41. ...Dr. Murray and UTMB have formulated forced labor policies designed to minimize possible heat exhaustion and heat stroke among inmates. However, despite knowing that medically vulnerable inmates spend most of their time inside, and despite knowing that indoor temperatures at the Garza West Unit and other transfer facilities routinely exceed 100 degrees in the summer, Dr. Murray has not instituted any practice or policy concerning safely housing inmates known to be especially vulnerable to the heat.
>
> 42. UTMB makes mandatory housing recommendations to TDCJ for some prisoners with disabilities – a prisoner using a wheelchair, for example, could not be assigned to a top bunk. But UTMB and TDCJ policies do not contemplate special housing for prisoners with heat-sensitive disabilities.
>
> 78. Similarly, after the two men died in 2007, Dr. Murray instituted no changes to UTMB's intake and housing practices, and continued to leave vulnerable prisoners at risk of heat stroke system-wide.
>
> 89. Despite these ten deaths in 2011, Dr. Murray and UTMB continued to house vulnerable inmates in extremely hot temperatures without any protections. And he did this knowing that some areas of TDCJ units, including at the Garza West Unit, have air conditioned spaces available.
>
> 104 ...UTMB providers at all prisons, including the Garza West Unit, continued to house inmates vulnerable to the heat in dangerously hot temperatures during the summer months without any housing restrictions. Dr. Murray, and the practices and policies for which he is responsible, (including not placing housing restrictions on inmates vulnerable to the heat, not providing intake physicals for inmates when they first arrive for extended periods of time despite the dangers they face, not providing medical care on site from 6:00 p.m.

> to 9:00 a.m. despite knowing the dangers extremely hot conditions present, having licensed vocational nurses providing treatment when they are not competent to do so, and inadequately training staff to recognize the signs of heat stroke and the immediate needfor treatment), is deliberately indifferent to inmates vulnerable to heat generally and to the decedents in this case specifically. UTMB is empowered and obligated to restrict an inmate's housing when his or her serious medical condition requires it.[10]
>
> 63. Similarly, Dr. Murray and UTMB have formulated work policies designed to minimize possible heat exhaustion and heat stroke among inmates. However, despite knowing that medically vulnerable inmates spend most of their time inside, and despite knowing that indoor temperatures at the Gurney Unit and other transfer facilities routinely exceed 100 degrees in the summer, Dr. Murray has not instituted any practice or policy concerning safely housing inmates known to be especially vulnerable to the heat. [11]
>
> 64. UTMB makes mandatory housing recommendations to TDCJ for some prisoners with disabilities – a prisoner using a wheelchair, for example, could not be assigned to a top bunk. But UTMB and TDCJ policies do not contemplate special housing for prisoners with heat-sensitive disabilities.
>
> 70. Similarly, after the two men died in 2007, Dr. Murray instituted no changes to UTMB's intake and housing practices, and continued to leave vulnerable prisoners at risk of heat stroke system-wide.[12]

UTMB staff's decision not to make a mandatory air conditioned housing recommendation for Hinojosa may not form the basis of a Constitutional claim against security administrators Thaler, Stephens and Livingston. *Lee v. Young*, 533 F.3d 505, 511 (7th Cir.2008) ("[I]n determining the best way to handle an inmate's medical needs, prison officials who are not medical professionals are entitled to rely on the opinions of medical professionals.”). Hayes v. Snyder, 546 F.3d 516, 527 (7th Cir.2008) (reiterating “the presumption that non-medical officials are entitled to defer to the professional judgment of the facility's medical officials on questions of prisoners' medical care”)

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[10] Plaintiffs' Response to Dr. Murray's Motion to Dismiss in *Webb v. Livingston et. al.*, USDC- Eastern District of Texas, Civil Action No.: 6:13-cv-00711-JDL, Document Number: 37, filed 10/30/2013).

[11] *Adams, et. al. v. Livingston et. al.*, USDC - Eastern District, Civil Action No. 6:13-CV-00712, Amended Complaint Doc Number 8: paragraphs 63, 64.

[12] *Martone v. Livingston, et. al.*, USDC - Southern District of Texas, Corpus Christi Division, Civil Action No. 3-13-cv-283, Complaint Doc. 1, paragraph 70.

> 68. Moreover, Dr. Murray and UTMB choose not to employ any medical staff at the Garza West Unit between 6:00 p.m. and 9:00 a.m., even though over 2,200 men are housed there every night and significant numbers (greater than 10%) suffer from hypertension or diabetes, take medications for serious mental illnesses, or are otherwise at greater risk from the extreme heat – especially when first acclimating to such harsh temperatures.
>
> 69. Livingston, Murray, and UTMB made this decision for financial reasons, despite knowing it placed inmates at risk during the evening and the middle of the night,and at grave risk in emergency situations where medical care was immediately needed.
>
> 70. As a consequence, vital medical care was delayed and/or denied to Hinojosa

There is no clearly established Constitutional right to on site prison medical facilities. Lindsey v. McGinnis, 1994 WL 162610 (6th Cir. 1994) (Prisoner claimed unconstitutional delay in treatment due to defendants not providing 24 hour on site medical treatment):

> Lindsey's reliance on United States v. Michigan, 680 F.Supp. 928 (W.D.Mich.1987), is misplaced. The court in that case did not order the facilities involved or LCF to provide 24-hour on-site physician services.

Obata v. Harrington, 2013 WL 1442481 (D.Hawai‘i,2013): (pp.3-4):

> Plaintiff alleges that WCF's lack of an onsite, twenty-four hour emergency facility violates his rights under the Eighth Amendment.
>
> ...
>
> **1. Lack of a Twenty-Four Hour Emergency Care Facility**.
>
> Plaintiff fails to allege facts showing that WCF's lack of a twenty-four hour emergency care facility violated his constitutional rights. The Constitution requires prison officials to provide timely and adequate medical (and dental) care to prisoners. It does not

require that every prison and jail have medical staff on duty twenty-four hours a day. *See,* *Bennett v. Reed,* 534 F.Supp. 83, 87 (E.D.N.C.1981)(absence of availability to qualified nurse on twenty-four hour duty does not violate prisoner's constitutional rights); *Williams v. Limetone Cnty.,* 198 F. App'x 893, 897 (11th Cir.2006)(absence of twenty-four hour medical staff on duty did not violate the prisoner's constitutional rights); *Robinson v. Conner,* 2012 WL 2358955 *5 (M.D.Ala.2012)(holding that prison's lack of twenty-four hour emergency infirmary, without more, fails to state a claim); *Parker v. Amos,* 2011 WL 3568836 *3 (W.D.Va.2011)(holding that jails and prisons are not required to provide twenty-four hour emergency care facilities). *4 Notwithstanding WCF's alleged lack of a twenty-four hour infirmary, Plaintiff fails to allege sufficient facts showing that (1) he required emergency medical care for a serious physical condition, (2) prison officials were aware of his serious need, and (3) nonetheless, refused or were unable to transport him to an emergency care facility outside of the prison with deliberate indifference to his health and safety. As such, Plaintiff fails to state a claim and this claim is DISMISSED.

2. Claims Against Warden Harrington

Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. *Igbal,* 556 U.S. at 676. Rather, each government official may only be held liable for his or her own misconduct. A defendant may be held liable as a supervisor under § 1983 if either (1) he or she was personally involved in the constitutional deprivation, or (2) there is a sufficient causal connection between the supervisor's wrongful conduct and the Constitutional violation. *Starr v. Baca,* 633 F.3d 1191, 1196 (9th Cir.2011). In general, a plaintiff "must allege that every government defendant—supervisor or subordinate—acts with the state of mind required by the underlying constitutional provision. *Or. State Univ. Student Alliance v. Ray*, 699 F.3d 1053, 1070 (9th Cir.2012). Conversely, where there is no evidence that the supervisor was personally involved or connected to the alleged violation, the supervisor may not be held liable. *See,* *Edgerly v. City and Cnty of San Francisco,* 599 F.3d 946, 961–62 (9th Cir.2010).

Plaintiff fails to establish that Warden Harrington was personally involved or otherwise responsible for the alleged delay or denial of medical care to Plaintiff. Plaintiff simply claims in conclusory terms that he was in pain on August 4, 2012, and that Warden Harrington knew that WCF lacked an onsite, twenty-four hour emergency facility. As explained above, even if Harrington was aware that WCF lacked a twenty-four hour infirmary, that does not equate to Harrington's deliberate indifference to Plaintiff's alleged need for

> emergency medical care on August 4, 2012. Plaintiff does not allege that Harrington was aware of Plaintiff's need for emergency care, or that Harrington instituted policies or procedures that denied medical services to prisoners who became ill overnight WCF. That is, that Harrington denied WCF staff the authority to transport Plaintiff or any other prisoner to an outside emergency medical facility if the need arose. An individual's "general responsibility for supervising the operations of a prison is insufficient to establish personal involvement." *Ourts v. Cummins,* 825 F.2d 1276, 1277 (8th Cir.1987). Plaintiff's allegations against Warden Harrington fail to state a cognizable constitutional claim and are DISMISSED.

Where a prisoner has received some medical attention, there is no deliberate indifference to a serious medical need by security administrators. Even if the course of treatment was incorrect, medical malpractice does not state an Eighth Amendment claim. *Estelle v. Gamble*, 429 U.S. 97, 104-07 (1976). *Dixon v. Howe*, 44 Fed.Appx. 274, 2002 WL 1891419 *1 (9th Cir. 2002) ("Dixon failed to present evidence to refute defendants' contention that the delay he experienced was comparable to that typical in the medical community."). There are no U.S. Supreme Court or Fifth Circuit cases that have held that prisons are required to maintain 24-7 on site medical services. Accordingly, Thaler, Stephens and Livingston are entitled to qualified immunity on this claim.

> 73. As the wardens and regional director, respectively, Guterrez and Kennedy are directly responsible for training the front-line officers charged with protecting prisoners' lives. Livingston, Thaler, and Stephens are ultimately responsible for ensuring all TDCJ corrections officers receive adequate training. Each failed to provide meaningful training, and many people died as a consequence.

The allegation that "Livingston, Thaler and Stephens are ultimately responsible for ensuring all TDCJ corrections officer receive adequate training..." is a respondeat superior/vicarious liability claim. Qualified immunity prohibits basing Constitutional liability of a public officer on the theory that the official is "ultimately responsible" for the actions of subordinates. *Blackmon v. Kukua, et al*, 758 F.Supp.2d 398 (S.D.Tex.,2010) p. 17 ("The Fifth Circuit has held that supervisory officials are not liable under §1983 unless "there exists either (1) his personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.")

To establish a failure to train, the plaintiffs must show that:

> (1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference. For an official to act with deliberate indifference a plaintiff must usually demonstrate a pattern of violations and that the inadequacy of the training is obvious and obviously likely to result in a constitutional violation.

Goodman v. Harris County, et.al., 571 F.3d 388, 395 (5th Cir. 2009); *Porter v. Epps*, 659 F.3d 440, 447-48 (5th Cir. 2011); *Walker v. Upshaw,* 515 Fed.Appx. 334 (5th Cir. 2013). (S.D. Tex. 2013, unpublished). (Plaintiffs must allege with specificity how a particular training program is defective.)

The phrase "ultimately responsible for ensuring all TDCJ corrections officers receive adequate training." (paragraph 73) is conclusory legalese that fails to defeat immunity.

> 88. Once again, as after prior deaths, Livingston, Thaler, Stephens, Kennedy and Guterrez failed and refused to make changes necessary to prevent heat deaths.

> 92. Livingston, Thaler, Stephens, Kennedy, Guterrez, Murray, TDCJ and UTMB knew indoor temperatures in TDCJ facilities regularly exceeded 90 degrees during the hot Texas summers, but failed and refused to take reasonable steps to protect the health and safety of prisoners.

> 97. Additionally, Kennedy, Guterrez, Thaler, Stephens, and Livingston are aware that daily temperature readings are taken at the prison and that these readings are routinely above 90° at all times during the summer months. Incredibly, despite their knowledge of

> these dangers, TDCJ has no policy concerning protecting prisoners from extreme heat in indoor housing areas, and no policy to cool the dangerously hot living areas.
>
> 99. Moreover, while Stephens and Thaler claim to remind wardens and regional directors to take heat-safety precautions, they do no such thing. Livingston, Thaler, Stephens, Kennedy and Guterrez know the measures allegedly taken are inadequate, but they have taken no action to improve TDCJ's response to heat-related emergencies even after the epidemic of heat-related deaths that preceded Hinojosa's.

Paragraphs 88, 92, 97, 99 consist of vague, conclusory puffery that federal courts have found insufficient to overcome a public official's qualified immunity. Claims that an official took no action, did not take reasonable steps or had no policy or an inadequate policy, describe no conduct violating clearly established law. Conclusory statements that cast blame devoid of any underlying facts or personal involvement do not overcome qualified immunity. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949-50 (2009):

> As the Court held in *Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id*., at 555, 127 S.Ct. 1955 (citing *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555, 127 S.Ct. 1955. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."

Supervisory security officials at the top level of the largest prison system in the United States cannot be held liable under § 1983 on the basis of sweeping generalities of unspecified omissions nor for the actions of subordinates based on vicarious/ respondeat superior liability- they can only be held liable when their own conduct denies claimant's constitutional rights):*Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 381(5th Cir.2005).

> 102. Likewise, Livingston was a named defendant in *Blackmon v. Kukua* –another lawsuit challenging the extreme conditions at the Garza East prison. In *Blackmon*, Livingston filed an answer making specific admissions and denials in April 2010, and admitted "the dorm areas where the inmates are housed [at the Garza East Unit] are not air conditioned." Mr. Blackmon complained he was exposed to apparent temperatures that reached 130° indoors at the Garza East Unit. *Blackmon* went to trial in February 2011, over a year-and-a-half before Hinojosa's death.

Based on the absence of personal involvement, TDCJ Director Brad Livingston was held to be entitled to qualified immunity in *Blackmon v. Kukua, et al*, 758 F.Supp.2d 398 (S.D.Tex.,2010): (Opinion attached as **Exhibit 1**-pp.17-18, 23)

> The summary judgment evidence does not show, however, that Defendant Brad Livingston, Executive Director of the TDCJ, knew about Blackmon's complaints, let alone that he took any action with respect to them. The Fifth Circuit has held that supervisory officials are not liable under §1983 unless "there exists either (1) his personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.
>
> ...
>
> Plaintiff cannot support an individual claim against Executive Director Livingston based simply on the fact that Blackmon filed grievances with officials at Garza East and that those officials failed to act. *See*, *Kidd v. Livingston*, 2010 WL 2208247, (E.D.Tex., May 26, 2010) ("The fact that [defendants] did not take the action on [plaintiff's] grievances which [plaintiff] thought appropriate does not show that a constitutional violation took place
>
> ...
>
> For the reasons discussed above, Defendants Latorre, M. Garza, and Livingston are entitled to qualified immunity to the extent that they could be found liable under the Eighth Amendment at all.

In *Blackmon v. Kukua, et al*, 758 F.Supp.2d 398 (S.D.Tex.,2010), the Complaint named as defendants, TDCJ Director Brad Livingston, the Warden of the Garza East unit where Blackmon was housed, as well as other staff employed at the Garza East prison unit. Blackmon alleged that defendants violated his rights under the Eighth and Fourteenth amendments by knowingly subjecting him to inhumane levels of heat during his time in East Garza and by acting with deliberate indifference to Blackmon's health and safety. Blackmon claimed that from May to October the indoor temperature at Garza East ranged from 88 to 104 degrees Fahrenheit and that "the administration building, control pickets, and other areas where prison employees worked were all air conditioned. (*Id.* at 27, 50-56.) The windows in the dorm were sealed shut." Opinion, p. 3.

Blackmon also alleged the absence of air conditioning and personal fans:

> The main ventilation in the East Garza dorms came from air handlers that brought in air from outside and circulated it through the dorms, but provided no conditioned air. (*Id.* at 42.) Each air handler served two dorms. (*Id.* at 39.) Garza East inmates were not permitted to have personal fans because there were not enough electrical outlets in the dorm for the inmates to use. There was no water fountain in the dorm. Ice water was made available three times daily (though the water may have run out on some occasions). (*Id.* at 22.) Offenders were also served iced water and/or beverage at all three meals in the offender dining room. (D.E. 141, Ex. H (Frances affidavit) at 2). But, according to Blackmon, thirsty prisoners were often forced to drink from one of the restroom sinks. (D.E. 142, Ex. A (Blackmon Decl.) at ¶19.) There were eight sinks for up to 54 prisoners, but many were often broken.

Opinion, p. 3

Blackmon, like the present Plaintiffs, alleged that due to his medical condition, the heat had exacted a higher toll on his health than on an inmate without his medical condition, that Livingston did not personally take action to limit his exposure and that he suffered a constitutional injury for which Livingston is liable:

> Blackmon contends that prolonged exposure to high temperatures and humidity threatened the physical and mental health of inmates at Garza East. (D.E. 120 at 4-5.) Blackmon himself suffers from hypertension for which he takes medication. (D.E. 142, Ex. A (Blackmon affidavit), ¶ 25.) He contends that his age and medical condition put him at acute risk of heat stroke, and that his blood pressure rose and his vision dimmed and became blurry as a result of the heat. (*Id.* at ¶¶ 27-29.) Blackmon further contends that Defendants were well aware of these conditions and did nothing to alleviate them, even after Blackmon wrote several grievances to Defendants regarding the heat conditions and the broken sinks.

Opinion, pp. 3-4

The Court found that extreme heat can violate the 8th Amendment and that there was a genuine issue of material fact as to whether the conditions Blackmon complained of constituted cruel and unusual punishment citing *Valigura v. Mendoza*, 265 Fed.Appx. 232, 235 (5th Cir. 2008):

> "[w]e have held that temperatures consistently in the nineties without remedial measures, such as fans, ice water, and showers, sufficiently increase the probability of death and serious illness so as to violate the Eighth Amendment."
>
> ...
>
> Upon review of the legal standards and the summary judgment evidence, the Court finds Blackmon has succeeded in raising a genuine issue of fact as to whether the conditions in the C-8 Dorm constituted an "extreme deprivation of any 'minimal civilized measure of life's necessities.'" *Gates*, 376 F.3d at 332. Blackmon has provided sufficient evidence of the extreme temperatures he suffered in the C-8 Dorm.

Opinion, pp.12-13

The court next analyzed which defendants had sufficient personal involvement to support a finding that they were deliberately indifferent to Blackmon's health and safety because they had knowledge of the complained of conditions. The Court concluded that as to TDCJ Director Livingston, it had not been established that he had sufficient knowledge or involvement, either by commission or omission, to defeat his qualified immunity: Opinion, pp. 17-18 [13]

> The summary judgment evidence does not show, however, that Defendant Brad Livingston, Executive Director of the TDCJ, knew about Blackmon's complaints, let alone that he took any action with respect to them. The Fifth Circuit has held that supervisory officials are not liable under §1983 unless "there exists either (1) his personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *Thompkins v. Belt*, 828 F.2d 298, 303-304(5th Cir. 1987) (citing *Harvey v. Andrist*, 754 F.2d 569, 572 (5th Cir. 1985)). Supervisory liability can also result if supervisory officials implement a policy so deficient that the policy "itself is a repudiation of constitutional rights" and is "the moving force of the constitutional violation." *Grandstaff v. City of Borger*, 767 F.2d 161, 169, 170 (5th Cir. 1985) (quoting *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 2037, 56 L. Ed. 2d 611 (1978)).`
>
> Under these standards, Plaintiff cannot support an individual claim against Executive Director Livingston based simply on the fact that Blackmon filed grievances with officials at Garza East and that those officials failed to act. *See*, *Kidd v. Livingston*, 2010 WL 2208247, (E.D.Tex., May 26, 2010) ("The fact that [defendants] did not take the action on [plaintiff's] grievances which [plaintiff] thought appropriate does not show that a constitutional violation took place. Nor does every letter or grievance written by an inmate to the Executive Director of TDCJ or the Director of the Correctional Institutions Division of TDCJ give rise to personal liability on the part of that official if the letter is not acted upon in the manner which

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[13] Plaintiffs in the case at bar have made no allegation that any of the Executive Defendants were notified of decedents' medical condition, that they had medical training that would have put them on notice that due to decedents' medical history, they required additional care, or that these defendants had personal knowledge or on the scene job duties requiring them to respond in a manner medically necessary to preserve their health.

> the inmate believes appropriate.") As such, Defendants' motion for summary judgment with respect to Livingston is granted.

Opinion pp. 17-18

> For the reasons discussed above, Defendants Latorre, M. Garza, and Livingston are entitled to qualified immunity to the extent that they could be found liable under the Eighth Amendment at all.

Opinion, attached as **Exhibit 1**, at p. 23

In the case at bar, Livingston is not alleged to have personal involvement with or knowledge of Hinojosa's medical history, specific needs or any other interaction that would support a finding of deliberate indifference. *Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 381(5th Cir.2005):

> With respect to the third prong, we have on several occasions reversed a district court's denial of qualified immunity, persuaded that support was lacking for a conclusion of deliberate indifference on the part of a supervisor.FN26 " '[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."FN27 "For an official to act with deliberate indifference, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."FN28 Deliberate indifference requires a showing of more than negligence or even gross negligence. *FN29* "Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity." *Citing* *Alton v. Texas A&M University*, 168 F.3d 196 (5th Cir.1999)

As was noted in *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011):

> "...existing precedent must have placed the statutory or constitutional question *beyond debate*." The *sine qua non* of the clearly-established inquiry is "fair warning." Thus, we must ask "not only whether courts have recognized the

> *existence* of a particular constitutional right, but also ... whether that right has been defined with sufficient clarity to enable a reasonable official to assess the lawfulness of his conduct."

Established precedent in the Fifth Circuit would not have given "fair warning" to defendants Livingston, Stephens or Thaler that they had a Constitutional duty to air condition Texas prisons, that they could be held liable for the medical and correctional staff's actions or omissions at a particular TDCJ prison or that they had a duty to provide 24-7 on site medical care at each of the 111 TDCJ prison units.

> 107. Livingston instructed his surrogates, including Thaler, to write back to Rep.Turner, but failed and refused to make any changes to TDCJ's operations.
>
> 109 ...Defendants did nothing to cool down the Garza West Unit and left inmates, including Hinojosa, in danger.
>
> 113. UTMB, TDCJ, Livingston, Thaler, Stephens, Kennedy, Guterrez, and Murray – at a minimum – callously failed and refused to take reasonable steps to safely house prisoners at the Garza West Unit and protect them from heat stroke, a risk they were well aware of at the time. Livingston, Thaler, Stephens, Guterrez, Kennedy, and Murray were deliberately indifferent to the extremely dangerous conditions caused by heat in TDCJ facilities.
>
> 114. Despite the epidemic of heat-related deaths, the Defendants have refused to act, authorize or otherwise approve actions to address these conditions.
>
> 115. At the time Hinojosa died, the law was clearly established that temperatures exceeding 90 degrees Fahrenheit are cruel and unusual, and create unconstitutional conditions of confinement. Thus, Livingston, Thaler, Stephens, Kennedy, Guterrez, and Murray are not entitled to qualified immunity.

Plaintiffs do not identify the "reasonable steps to safely house prisoners " that the top three TDCJ security administrators, Thaler, Stephens and Livingston, were constitutionally required to take to protect inmates from heat, that no similarly situated TDCJ or CID Director could have reasonably failed to undertake:

> ...Plaintiff has the burden to prove that no reasonable, similarly situated, official could have considered the conduct of the government officials to be lawful, under the circumstances known to him at the time. *See*, *Anderson*, 483 U.S. at 640–41, 107 S.Ct. at 3039–40; *Burns–Toole v. Byrne*, 11 F.3d 1270, 1274 (5th Cir.1994).FN4 The reasonableness inquiry of the official's conduct is measured with reference to the law as it existed at the time of the conduct in question. *See*, *King v. Chide*, 974 F.2d 653, 657 (5th Cir.1992). "If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity." *Pfannstiel*, 918 F.2d at 1183.

The allegations made in paragraphs 107-115 are conclusory, set out no facts nor a violation of clearly established law under the circumstances presented. Alleging that defendants should have done something and did not does not overcome immunity, specifying no facts showing personal involvement of these defendants, does not overcome qualified immunity. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949-50 (2009). Using the phrase, "reasonable steps" as a way to suggest that defendants should have done something not required by the U.S. Constitution does not state facts showing that these defendants acted or failed to act in violation of clearly established law under the circumstances presented.

As this is not a class action, Plaintiffs may not base liability on any acts or failure to act that allegedly may have harmed unidentified "prisoners" and "inmates" not parties in this case, as done in paragraph 109, 113. General allegations that a defendant violated a person's constitutional rights or failed to act in some unspecified manner, especially when that defendant is not alleged to have knowledge of or personally involved in any of the events that allegedly harmed Plaintiffs, must be disregarded as failing to have pled facts that overcome qualified immunity:

> ...if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of Harlow...It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right. *Anderson v. Creighton*, 483 U.S. 639-40(1987). *Ashcroft v. Iqbal,* 556 U.S. 678, 129 S. Ct. 1937, 1949-50 (2009) ("...a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face.")

II. THE COMPLAINT FAILS TO ALLEGE THAT DEFENDANT TOP LEVEL SECURITY ADMINISTRATORS VIOLATED CLEARLY ESTABLISHED FIFTH CIRCUIT LAW.

In *Gates v. Cook*, 376 F.3d 323,339-40 (5th Cir. 2004), the district court entered numerous injunctions, including one that "direct[ed] [the prison officials] to provide fans, ice water, and daily showers when the heat index is 90 degrees or above, or alternatively to make such provisions during the months of May through September." The Fifth Circuit affirmed this injunction. *Valigura v. Mendoza*, 265 Fed.Appx. 232, 235 (5th Cir. 2008) found the necessity of remedial measures, such as fans, ice water, and showers to mitigate extreme heat, if appropriately employed, constitutionally sufficient and making no finding that air conditioning is constitutionally required). *Woods v. Edwards,* 51 F.3d 577 (5th Cir.1995) held that mere allegations of high temperatures in a lockdown cell could not support a claim that an inmate was subjected to cruel and unusual punishment.

Aside from repeatedly complaining about the absence of air conditioning, which has not been held to be Constitutionally required, the Complaint does not allege that these defendants had a policy that failed to provide the heat mitigating measures described by the Fifth Circuit. This is likely because Plaintiffs' attorneys, through discovery in similar heat cases previously filed, have discovered that Thaler, Stephens and Livingstone, did, by directives to prison unit staff, communicate their policy of providing the mitigating items referenced by the Fifth Circuit in the cases cited above. Pursuant to Fed. R. Evid. 201, the Court may take judicial notice of the claims made by Plaintiffs' counsel in other similar prison heat death cases, all of which are referenced in the Complaint in the case at bar on page 8 and in paragraphs 79-91. *Adams et. al. v. Livingston et. al.*, Eastern District, Tyler Division Civil Action No. 6:13-CV-00712; Amended Complaint, (Doc 8) paragraphs 123, 124:

> 123. Instead of having a formal policy, TDCJ relies on an informal email discussing the extreme temperatures indoors. But while this email acknowledged the dangers of heat to prisoners, it does not provide for any way to protect a prisoner with heat-sensitive medical conditions from extreme temperatures. Instead, it relies on measures proved inadequate when men died in 2007, like increasing water intake and providing additional fans, neither of which occurred at the Gurney Unit.
>
> 124. Stephens and Thaler claim to send the email in May of each year to remind wardens and regional directors to begin to take heat-safety precautions.

Martone v. Livingston, et. al. , USDC -Southern District of Texas, Corpus Christi Division, Civil Action No. 3-13-cv-283, Complaint (Doc. 1), paragraph 85:

> 85. ...it [TDCJ] relies on measures prove inadequate when men died in 2007, like increasing water intake and providing additional fans, neither of which occurred at the Huntsville Unit. And neither of which cool the apparent temperature.

"Fair warning", in the context of defeating defendant TDCJ security administrators' qualified immunity in this case, would require that the Fifth Circuit imposed a constitutional duty to air condition all 111 prison units, which is the ultimate basis of the Complaint in this case. This is beyond what in *Gates v. Cook*, *Valigura v. Mendoza*, *Woods v. Edwards*, and*Blackmon v. Kukua, et al*, 758 F.Supp.2d 398 (S.D.Tex.2010) require.

The legalese jargon, asserting conclusions, rather than facts, in paragraphs 107-115, are the type of sweeping allegations federal courts have held insufficient to defeat qualified immunity:

> 107. Livingston... failed and refused to make any changes to TDCJ's operations.
>
> 109 ...Defendants did nothing to cool down the Garza West Unit and left inmates, including Hinojosa, in danger.
>
> 113. ...Livingston, Thaler, Stephens,...callously failed and refused to take reasonable steps to safely house prisoners at the Garza West Unit and protect them from heat stroke, a risk they were well aware of at the time. Livingston, Thaler, Stephens,... were deliberately indifferent to the extremely dangerous conditions caused by heat in TDCJ facilities.
>
> 114. ... the Defendants have refused to act, authorize or otherwise approve actions to address these conditions.
>
> 115. ...the law was clearly established that temperatures exceeding 90 degrees Fahrenheit are cruel and unusual, and create unconstitutional conditions of confinement.

See, *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949-1950 (2009):

> A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555, 127 S.Ct. 1955. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."... the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

For an administrative official to be liable for a policy violation, the official must "implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987). These paragraphs do not identify any policy of these Defendants that meets this standard. Rather, it is vaguely alleged that Defendants have "refused to make changes, did not "approve actions to address these conditions" and other conclusory phrases that fall short of defeating qualified immunity.

If the failure to act allegations in paragraphs 107-114 are construed to claim that the Executive Director of TDCJ and the Director of TDCJ Correctional Institutions Division did not move individuals with heat-sensitive medical conditions to an air-conditioned environment, or provide 24-7 on site medical care, such a claim fails to overcome qualified immunity in four ways:

1. There is no constitutional duty to provide air conditioned prisons. *Blackmon v. Garza,* 484 Fed. Appx. 866 (5th Cir. 2012) fn.6.

2. It has not been alleged that the top prison administrators have a personal involvement or duty in assigning or classifying inmates to a particular prison unit or in reviewing inmate medical charts to make such decisions. In fact, the Complaint correctly admits that medical housing assignments are determined by mandatory recommendations made by UTMB staff. Complaint, paragraph 42.

3. These defendants are not alleged to have the medical training, qualification and education to make decisions on what medical condition an inmate has, the degree and seriousness of the condition and at what point it would be medically required that a particular inmate be housed or treated differently than an inmate without such medical condition or an inmate with a less severe form of the same condition. *Lee v. Young*, 533 F.3d 505, 511 (7th Cir.2008) ("[I]n determining the best way to handle an inmate's medical needs, prison officials who are not medical professionals are entitled to rely on the opinions of medical professionals."). *Hayes v. Snyder,* 546 F.3d 516, 527 (7th Cir.2008) (reiterating "the presumption that non-medical officials are entitled to defer to the professional judgment of the facility's medical officials on questions of prisoners' medical care")

4. There is no Constitutional right to an on site prison medical facility. *Obata v. Harrington*, 2013 WL 1442481 (D.Hawai'i,2013): (pp.3-4)

The absence of personal involvement cannot be transformed into a Constitutional claim solely by alleging a failure to act under circumstances indicating no clearly established duty to act. A case that demonstrates the insufficiency of the Amended Complaint is *Duvall v. Dallas Co.*, 631 F.3d 203, 209 (5th Cir. 2011). Unlike the Amended Complaint in this case, Sheriff was not only shown to be aware of a health problem that caused Plaintiff injury-the Plaintiff in that case, unlike the Plaintiffs in the case at bar, demonstrated that a specific, inexpensive policy to eliminate the health problem was available:

> the jury heard evidence that the jail had refused to install the necessary hand washing and disinfecting stations and had failed to use alcohol-based hand sanitizers, which are the recommended means of hand disinfection, especially in a jail setting where much contact occurs in the cell block.

Though simple, inexpensive measures could have combated the staph infection that was compromising inmate health, the county's policymakers chose to do nothing.

By contrast, the Complaint either identifies no policy, using empty phrases such as "Defendants have refused to act", or identifies not air conditioning all 111 TDCJ prison units, which is not a clearly established Constitutional requirement. The Complaint instead asserts as the basis for overcoming Defendants' qualified immunity, the inadequacy of fans and water to mitigate the heat-policies approved by the Fifth Circuit in *Gates v. Cook*, *Valigura v. Mendoza*, *Woods v. Edwards*, and *Blackmon v. Kukua, et al*. (policies that employ fans, ice water, and showers to mitigate extreme heat, when implemented by Unit staff, constitutionally sufficient and making no finding that air conditioning is constitutionally required as a system wide TDCJ policy.)

> 92. Livingston, Thaler, Stephens, Kennedy, Guterrez, Murray, TDCJ and UTMB knew indoor temperatures in TDCJ facilities regularly exceeded 90 degrees during the hot Texas summers, but failed and refused to take reasonable steps to protect the health and safety of prisoners.
>
> 93. And Livingston, Thaler, Stephens, Kennedy, Guterrez, and Murray all knew inmate living areas at the Garza West Unit were not air conditioned and that the apparent temperatures routinely skyrocketed during the hot Texas summers and routinely exceeded 90 degrees indoors.

Paragraphs 92, 93 function at the generality level held insufficient by federal courts- identifying a broad constitutional right and purporting to overcome qualified immunity without regard to the personal involvement of defendant or the circumstances presented. At this level of generality, Plaintiffs' claims are constitutionally meaningless. Asserting that a *per se* temperature of 90 degrees or above at a Texas prison violates the Constitution, without specifying facts that demonstrate a particular defendant's personal involvement or conduct prohibited by clearly established law does not defeat these defendants' qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3039 (1987):

> Qualified immunity depends substantially upon the level of generality at which the relevant "legal **3039 rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of Harlow. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. Harlow would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of

> their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." *640 Davis, *supra*, 468 U.S. 183, 104 S.Ct. 3012 (1984). FN2 It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

This point was emphasized in *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) summarizing precedent on this issue:

> ...the Supreme Court has held that generalizations and abstract propositions are not capable of clearly establishing the law. The Supreme Court recently—and forcefully—underscored this point in *Ashcroft v. al-Kidd*, where it noted, with some exasperation, that it has "repeatedly told courts ... not to define clearly established law at a high level of generality."[FN30]
>
> FN30. *Id.* (citations omitted); *See also* *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (holding that the clearly-established inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition").

Paragraph 92, 93 illustrate the type of conclusory allegations that fail to set forth a Constitutional claim against a public official. To permit a case to go forward against the chief TDCJ security administrators on the basis of broad, conclusory allegations and on decisions made by medical professionals and correctional staff on the scene directly and personally involved in the treatment and care of one of the 152, 303 inmates, in 111 TDCJ Units, where these defendants had no previous knowledge of Hinojosa's medical history or circumstances and no personal involvement in any medical/classification/housing assignment decisions regarding him is not supported by clearly established law. Aside from alleging that the Executive defendants should have air conditioned all

111 TDCJ units[14], Plaintiffs' do not assert what policy TDCJ should have had or demonstrate how that policy or lack thereof directly caused the deaths at issue in this case. *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (To overcome immunity, specific facts must be set out demonstrating that defendant's conduct violated a clearly established right under the circumstances faced by the official.)

III. THE TOP THREE SECURITY ADMINISTRATORS OF TDCJ MAY REASONABLY RELY ON THE MEDICAL TREATMENT, CLASSIFICATION, HOUSING AND FACILITY STRUCTURES IN PLACE TO PROVIDE FOR INMATE NEEDS AND DO NOT VIOLATE CLEARLY ESTABLISHED LAW BY NOT MICRO MANAGING THE JUDGMENTS AND ACTIONS TAKEN BY TDCJ UNIT STAFF AT GARZA WEST.

The Garza West Unit in Beeville, Texas is 253.54 miles, 4 hours 16 minutes from the defendants' offices in Huntsville, Texas.[15] These defendant prison security administrators are not alleged to have had any day to day involvement in Garza West Unit operations, classifications, housing or medical assignments. They are alleged to have failed to air condition Texas prisons, failed to medically evaluate and transfer Mr. Hinojosa to an air conditioned environment consistent with his medical history and have not provided 24-7 on site medical treatment-none of which is required of them by clearly established law. These defendants rank at the highest 3 levels of TDCJ Security Administration as TDCJ Director (Livingston) and the Directors of the Correctional Institution Division(CID), Thaler and Stephens. There are numerous subordinate TDCJ employees and TDCJ divisions with a direct duty as to the supervision, care and treatment of Garza West and other TDCJ units inmates: The Deputy Director for Prison and Jail Operations, the Regional Director that includes the Garza East Unit, the Warden, correctional, medical staff and contract staff

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14 http://www.tdcj.state.tx.us/unit_directory/

15 http://www.mapquest.com/?le=t&s=name%3AFast+Food&vs=#fff649c7afdbf38d9ef05d7f

are charged with making day to day operations, classification, medical, housing and work assignment and other decisions related to the care and supervision of offenders[16].

There is additionally a Deputy Director for Management Operations that includes tiers of training administrators and an organizational branch below these defendants titled Deputy Director, Support Operations that includes classification of inmates as well as a branch that is entitled Chief Financial Officer below which is the Facilities Division Director. *Id.* As would be expected, if a circulation fan, the plumbing fixtures or any one of a number of systems that support a TDCJ unit fails, and needs to be repaired or replaced or additional water or fans or ice becomes necessary due to weather or other conditions, a Garza West Unit correctional officer, sergeant, lieutentant, captain, major, assistant warden or warden, is not going to call the TDCJ Director Brad Livingston or the CID Directors, Stephens and Thaler and ask them to "take steps" to fix it as there are entire administrative divisions at TDCJ staffed to respond to specific medical and other needs of inmates and the Units in which they are assigned. Under the circumstances presented, no plausible Constitutional claim asserting personal involvement in a violation of Constitutional rights has been set forth in the Complaint within the meaning of *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949(2009):

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570, 127 S.Ct. 1955. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556, 127 S.Ct. 1955. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' "

[16] http://www.tdcj.state.tx.us/documents/executive_services/Org_Structure_FY2011.pdf.

CONCLUSION

The Fifth Circuit has explained that "conclusory allegations and unsubstantiated assertions" are not sufficient to overcome the qualified immunity defense. Miller v. Graham, 447 F. App'x 549, 551 (5th Cir. 2011) (citing Hathaway v. Bazany, 507 F.3d 312, 319 (5th Cir. 2007); Sylvester v. Cain, 311 F. App'x 733, 735 (5th Cir., Feb. 20, 2009) (citing Thompson v. City of Starkville, Miss., 901 F.2d 456, 469 n.13 (5th Cir. 1990))".

Plaintiff's conclusory allegations speculating that the absence of policies not Constitutionally required, such as air conditioning or 24-7 on site medical facilities, could have been implemented by TDCJ Executive Director Livingston and CID Directors Thaler and Stephens, violated clearly established law, are insufficient to overcome qualified immunity. The claim that security administrators have a Constitutional duty to make medical housing assignments or otherwise bypass the judgment of medical and correctional officials at the Garza West Unit is not supported by federal law.

In the absence of personal knowledge or personal involvement, supervisory liability does not attach, where the connection between TDCJ Security Administrators Executives and TDCJ corrections and medical staff is separated by a chain of command that includes Sergeants, Lieutenants, Captains, Majors and Assistant or Deputy Directors and medical staff, assigned to provide the precise care that Plaintiffs claim was lacking.[17] The Complaint must allege more than that defendants should have provided air conditioning or "taken steps", "refused to act" or similar meaningless vague conclusory assertions. The Complaint must specifiy a policy or custom

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http://www.tdcj.state.tx.us/documents/executive_services/Org_Structure_FY2011.pdf implemented by the TDCJ Security Administrators that was the moving force behind the constitutional violation. Duvall v. Dallas County, Tex., 631 F.3d 203, 209 (5th Cir. 2011). They must identify the policy, connect the policy to the supervisory defendant and show that injury was incurred because of the implementation of that administrator's specific policy. Bennett v. City of Slidell, 728 F.2d 762, 767 (5th Cir. 1984).

Plaintiffs must establish that each TDCJ chief executive, as an administrator/policy maker, through deliberate conduct was "the moving force behind the injury" alleged and must establish a direct causal link between his action in formulating and implementing a specific policy that resulted in the deprivation of a federally protected right. Board of County Comm'r v. Brown, 520 U.S. 397, 405 (1997). The Complaint at bar has made no allegations satisfying this threshold. The top three (3) TDCJ Security Administrators are defendants on the basis that prisons are Constitutionally required to be air conditioned; that Defendants should have "taken steps" or had in place some unidentified policies; or that the conduct or omissions of co-defendants responsible for providing medical care, supervision and housing assignments at the Garza West Unit should be attributed to these defendants on a respondeat superior/vicarious liability theory. ("73. As the wardens and regional director, respectively, Guterrez and Kennedy are directly responsible for training the front-line officers charged with protecting prisoners' lives. Livingston, Thaler, and Stephens are ultimately responsible for ensuring all TDCJ corrections officers receive adequate training.") (Complaint, paragraph 73).

As to the Complaint's medical claims, it is clearly established law that security administrators may rely on the judgments and decisions of medical professionals tasked with administering inmate care and are not Constitutionally required to monitor an inmate's medical history and substitute their own judgment as to a prisoner's housing, classification and treatment. *Lee v. Young*, 533 F.3d 505, 511 (7th Cir.2008) ("[I]n determining the best way to handle an inmate's medical needs, prison officials who are not medical professionals are entitled to rely on the opinions of medical professionals."). *Hayes v. Snyder*, 546 F.3d 516, 527 (7th Cir.2008) (reiterating "the presumption that non-medical officials are entitled to defer to the professional judgment of the facility's medical officials on questions of prisoners' medical care"). *Obata v. Harrington*, 2013 WL 1442481 (D.Hawai'i,2013): (pp.3-4) (Summarizing federal decisions holding that the U.S. Constitution does not require that every prison and jail have medical staff on duty twenty-four hours a day).

Accordingly, TDCJ Director Brad Livingston, TDCJ Correctional Institutions Division (CID) Director William Stephens and retired CID Director Rick Thaler ask that the Complaint be dismissed against them on the basis of qualified immunity. Defendants also request attorney's fees and costs as provided by 42 U.S.C. 1988(b).[18]

Respectfully submitted,

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[18] (b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

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NOTICE OF ELECTRONIC FILING

I, DEMETRI ANASTASIADIS, Assistant Attorney General of Texas, do hereby certify that I have electronically submitted for filing, a copy of **Brad Livingston, Rick Thaler and William Stephens' Motion to Dismiss on the Basis of Qualified Immunity** in accordance with the Electronic Case Files system for the Southern District of Texas, on the 15TH day of November, 2013.

/s/ Demetri Anastasiadis
DEMETRI ANASTASIADIS
Assistant Attorney General

CERTIFICATE OF SERVICE

I, DEMETRI ANASTASIADIS, Assistant Attorney General of Texas, certify that a copy of **Brad Livingston, Rick Thaler and William Stephens' Motion to Dismiss on the Basis of Qualified Immunity**, has been served electronically *via* the Electronic Case Files system of the Southern District of Texas, on this the 15th day of November, 2013, addressed to:

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